BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 98R-1325
Ernest J. Teichert	)	
	)	

Representing the Parties:

For Appellant:	Ernest J. Teichert
For Respondent:	Sherman E. Eatmon, Counsel
Counsel for Board of Equalization:	Craig R. Shaltes, Tax Counsel
	Alina C. Ghitea, Legal Intern

O P I N I O N

This appeal is made pursuant to section 19324[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board (FTB or respondent) in denying the claim of Ernest J. Teichert for refund of interest paid in the amount of $231.93 for the year 1994. At issue is whether this Board has jurisdiction to review respondent's determination not to refund interest which accrued on an assessment, and if so, whether respondent abused its discretion in reaching that determination.

Appellant filed a timely 1994 California personal income tax return. On August 11, 1998, respondent issued a Notice of Proposed Assessment (NPA) for 1994 due to erroneous

[1] Unless otherwise specified, all section references are to sections of the California Revenue and Taxation Code as in effect for the year in issue.

deductions taken for moving expenses. The NPA explained that for federal tax purposes, moving expenses are allowed as an adjustment to income; however, for California tax purposes, moving expenses must be itemized.[2] The NPA revised appellant's taxable income and proposed an addition to tax in the amount of $661. The NPA also reflected interest in the amount of $228.56, which accrued from April 15, 1995, to August 11, 1998. On August 15, 1998, appellant submitted a check in the amount of $661 as payment for additional tax due, but he did not pay the accrued interest.

On October 29, 1998, respondent received an additional check from appellant in the amount of $231.93 as payment of the proposed accrued interest, together with a request for a refund for said amount. On December 4, 1998, respondent denied appellant's October 29, 1998, interest refund request. In a letter dated December 10, 1998, appellant filed the present appeal. On appeal, appellant's position is that the instructions in the FTB tax booklet were misleading and that he relied to his detriment on those instructions; for that reason, appellant contends that all interest should be abated and/or refunded.

Imposition of interest on a tax deficiency is mandatory. (See Appeal of Amy M. Yamachi, Cal St. Bd. of Equal., June 28, 1977.) Further, interest is not a penalty, but is simply compensation for a taxpayer's use of money after the due date of the tax. (Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976.) The FTB is provided with the power to abate the interest accrued on a deficiency. (Rev. & Tax. Code, § 19104, subd. (c)(1).) Furthermore, by statute, the Legislature recently conferred jurisdiction on this Board to review respondent's denial of a request to abate interest. (Rev. & Tax. Code, § 19104, subd. (c)(1)(C)(ii), as amended, operative Jan. 1, 1998.) Section 19104, subdivision (c)(1)(C)(ii), states:

> "(ii) Within 180 days after the Franchise Tax Board mails its notice of determination not to abate interest, a taxpayer may appeal the Franchise Tax Board's determination to the State Board of Equalization. The State Board of Equalization shall have jurisdiction over the appeal to determine whether the Franchise Tax Board's failure to abate interest under this section was an abuse of discretion, and may order an abatement."

Appellant appropriately invokes this Board's jurisdiction to review his claim for refund of interest because, according to the Revenue and Taxation Code, this Board has jurisdiction over appeals from a denial of a claim for refund of interest by the Franchise Tax Board. (Rev. & Tax. Code, §§ 19104, subd. (c)(1)(B), and 19324.) The effect of the recent amendments to 19104 (operative January 1, 1998) is to abrogate this Board's decisions in the Appeal of Phillip C. and Ellen Boesner

[2] Beginning in tax year 1994, federal law provided that qualified moving expenses were no longer reported as itemized deductions on federal Schedule A. Rather, for tax year 1994, federal law allowed the deduction of qualified moving expenses in figuring federal AGI. However, California law was not in conformity with this federal provision that dealt with moving expenses, until **1996** (Rev. & Tax. Code, § 17072).

Snell (92-SBE-023), decided July 30, 1992, and Appeal of Murieta Sales Corp. (93-SBE-011), decided on June 24, 1993 (both holding that this Board would not exercise its power under section 19324 to review a denial by the FTB of a claim of refund of interest).

The California interest abatement statute (Rev. & Tax. Code, § 19104, subd. (c)(1)) is modeled after a similar federal statute, Internal Revenue Code (IRC) section 6404(g), which was enacted pursuant to IRC section 302(a) of the Taxpayer Bill of Rights 2 (Pub. L. 104-168, 110 Stat. 1452, 1457 (1996).)[4] "Where a California statute is patterned after a federal statute and that federal statute has been judicially construed, there is a very strong presumption of intent to adopt the judicial construction of that prior enactment. (Holmes v. McColgan, 17 Cal.2d 426, 430 [110 P.2d 428] (1941); see also, Meanley v. McColgan, 49 Cal.App.2d 203 [121 p.2d 45] (1942).)" (Appeal of Lloyd B. and Beatrice Hegardt, Cal. St. Bd. of Equal., Nov. 17, 1982.) Therefore, the interpretation of the California statute should be consistent with the interpretation of the federal statute by the United States Tax Court. In Bourekis v. Commissioner (1998) 110 T.C. 20, the tax court held that under IRC section 6404(g), taxpayers have to follow the statutory procedures for requesting an abatement of interest before pursuing the matter in tax court and that a notice of deficiency did not constitute a final denial of the request for abatement of interest. Rather, taxpayers must first make a formal request to the IRS for interest abatement pursuant to IRC section 6404(g) and receive a formal, written denial as a prerequisite to the tax court's jurisdiction. In the context of a refund claim, a taxpayer must first pay the disputed interest, timely request a refund, and receive a formal denial, before the taxpayer may appeal to this Board.

Respondent argues that appellant may not avail himself of the remedies available under § 19104, subdivision (c)(1), because appellant did not use FTB Form 3701, "Request for Abatement of Interest." In the instant case, since respondent mailed a formal denial of a claim for refund of interest on December 4, 1998, it is clear that respondent intended that denial to serve as a final determination not to abate (or refund, in this case) interest. Appellant should not thereafter be required to duplicate this procedure by submitting a Form 3701.

Appellant asks us to review whether respondent abused its discretion in not abating interest. However, respondent has power to abate interest only in the limited situations specified in the statute. The only pertinent statute in the present case is Section 19104, subdivision (c)(1), which states in relevant part:

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[4] IRC section 6404(g) stated: "The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest." (Renumbered; see now Int.Rev. Code, § 6404(i) (effective July 2, 1998).)

> "In the case of any assessment of interest, the Franchise Tax Board may abate the assessment of all or any part of that interest for any period in either of the following circumstances:
>
> "(A) Any deficiency attributable in whole or in part to any unreasonable error or delay by any officer or employee of the Franchise Tax Board (acting in his or her official capacity) in performing a ministerial or managerial act.
>
> "(B) Any payment of any tax described in section 19033 to the extent that any delay in that payment is attributable to that officer or employee being dilatory in performing a ministerial or managerial act.
>
> "(C) For purposes of this paragraph:
>
> "(i) An error or delay shall be taken into account only if no significant aspect of that error or delay can be attributed to the taxpayer involved, and after the Franchise Tax Board has contacted the taxpayer in writing with respect to that deficiency or payment.
>
> "(ii) ….
>
> "(iii) Except for the amendment adding clause (ii), the amendments made by the act adding this clause are operative with respect to taxable or income years beginning on or after January 1, 1998. The amendment adding clause (ii) is operative for requests for abatement made on or after January 1, 1998."

(Emphasis indicates amendments which are operative only for tax years beginning on or after January 1, 1998.) We note that, because the year at issue is 1994, the recent addition of language prescribing any "unreasonable error or delay by… the Franchise Tax Board… in performing a … managerial act" does not apply. (Rev. & Tax. Code, §19104, subds. (c) (1) (A) and (c) (iii).) Therefore, for this Board to decide the present appeal, appellant needs to show that he paid interest because of an error or delay by respondent's employees in performing a ministerial act. Further, appellant also needs to show that no significant aspect of the error or delay was attributable to him, and that said error or delay occurred after respondent initially contacted him about the deficiency underlying the disputed interest.

Appellant's claim does not fall within the requirements of the above-quoted statutory language. The improper deduction of moving expenses occurred in 1995 when appellant prepared his

return for the 1994 taxable year. These facts are detrimental to appellant's claim because, according to the statutory language, respondent can only abate interest which accrued due to an error on its part which occurred "after the FTB has contacted the taxpayer in writing." The first written communication with respect to the deficiency at issue occurred when respondent sent out the NPA on August 11, 1998, long after appellant read the 1994 tax booklet instructions. Furthermore, the mistakes which occurred when appellant filled out his 1994 tax return are not attributable to an error by an officer or employee of the FTB, but rather the mistake was made by appellant. Therefore, respondent was correct in its determination not to abate interest because appellant has not alleged facts sufficient for relief under section 19104, subdivision (c)(1).

Based upon the foregoing discussion, the action of the respondent is sustained.[5]

[5] Appellant's assertion that he is nevertheless entitled to a full refund because he relied on the information supplied by the FTB sounds in the nature of an estoppel argument. Appellant's estoppel argument, i.e., that appellant's reliance upon respondent's allegedly faulty, misleading or erroneous instructions should bind respondent from disallowing the moving expenses deduction, must also fail. There is no support for appellant's allegation that he relied upon respondent's 1994 instructions, issued in 1995, in determining his moving expenses in 1994. (See Appeal of Priscilla L. Campbell, Cal. St. Bd. of Equal., Feb. 8, 1979.) Also, we have refused to invoke estoppel in cases where taxpayers have somehow understated their tax liability on their returns because of claimed reliance on allegedly ambiguous or incorrect instructions issued by respondent. (See Appeal of Michael M. and Olivia D. MaKieve, Cal. St. Bd. of Equal., Nov. 19, 1975; Appeal of Lester A. and Catherine B. Ludlow, Cal. St. Bd. of Equal., Mar. 18, 1975.)

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 19333 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Ernest J. Teichert for refund of personal income tax and/or interest accrued on that tax in the amount of $231.93 for the year 1994, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of September, 1999, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Andal, Mr. Chiang, Mr. Parrish and Ms. Mandel* present.

Johan Klehs , Chairman

Dean F. Andal , Member

John Chiang , Member

Claude Parrish , Member

Marcy Jo Mandel* , Member

*For Kathleen Connell per Government Code section 7.9.